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VALS Submission to the Standing Committee on Legal and Constitutional Affairs in response to the Family Law Amendment (Shared Parental Responsibility) Bill 2005 Exposure Draft (sent 25 July 2005)

Introduction

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) and Elizabeth Hoffman House presented at a Public Hearing on Wednesday 20th July 2005 in Melbourne. This submission is based on the issues VALS raised in our presentation at the Public Hearing.

We welcome the opportunity to comment on the (Shared Parental Responsibility) Bill 2005 Exposure Draft (Bill). As you are aware, the timelines for comment on the Bill are extremely tight. Obviously we have not had time to consider the Bill in as much detail as we would have liked however please see our initial comments below.

Please see a list of VALS recommendations at Appendix A.

Background of VALS

First, I would like to provide a few words of introduction about VALS. VALS is a State-wide service providing legal advice, representation, education, policy and law reform to Aboriginal and Torres Strait Islander people.

VALS was established in 1972 and is governed by a Board of Indigenous Australian Directors. VALS has ten Indigenous Australian Client Service Officers (CSO) who provide information and assistance to clients and help bridge the gap between the legal culture and institutions and the Indigenous Australian community. Six of the CSO are based in regional Victoria. Slightly more than 50% of the Indigenous Australian population lives outside Metropolitan Melbourne. The city based CSOs also provide an after hours phone service which provides a response to notifications from Victoria Police when Indigenous Australians are taken into custody.

VALS has twelve lawyers, three of whom do family law and one of whom does civil law. Our civil and family lawyers see approximately equal percentages of males and females (ie: 50%).

VALS provides the majority of Legal Aid services to criminal law clients. Civil and Family law services make up over sixty percent of assistance provided by VALS. VALS supports mainstream services becoming more culturally aware and accessible to Indigenous Australian people and VALS has many cooperative arrangements in support of this principle. However, VALS does not believe that support of mainstream services to become

more culturally aware should not be at the expense of support for and funding being directed towards a strong and high quality range of Indigenous Australian services.

VALS is aware that there needs to be both Indigenous Australian and non Indigenous Australian services for Indigenous Australians. The purpose of this is to cater for conflicts of interest that often arise at Indigenous Australian organisations that cover the State. Also, it is to ensure that people have a viable choice if they do not wish to use an Indigenous Australian service.

Access to Legal Representation

VALS is concerned that people will be denied access to legal representation before they undergo compulsory Family Dispute Resolution. This is because the majority of people will be sent away from the Family Law Court (Court) to undergo Family Dispute Resolution before they can return to the Court. It is foreseeable that many of the people who are directed to Family Dispute Resolution by the Registrar will not know it is in their interests to get legal advice or how to access it.

In making the above argument VALS acknowledges that there is a downside to the adversarial system in the context of family law. However, redirecting cases from the adversarial system to an alternative Family Dispute Resolution set up, without access to legal representation, could also have negative outcomes. The negative outcome is a result of failure to address power imbalances between the parties.

VALS argues that the right to legal representation is a fundamental human right. It is essential that people have access to legal representation before they undergo Family Dispute Resolution. The benefits of legal advice prior to Family Dispute Resolution is that people will be aware of the legal framework and aware of their rights. If people are aware of their legal rights they will feel more in control throughout the Family Dispute Resolution process. They will be aware of what is a good or bad outcome in the circumstances. Parties need to be fully aware of what they are getting themselves into. It is foreseeable at Family Dispute Resolution that a stronger party can take advantage of the fact that a person is not empowered by knowing their rights or what is a good outcome in the circumstances. It could result in an outcome that is inappropriate in the circumstances, such as unworkable, or just plain unfair. If people have access to legal representation prior to Family Dispute Resolution the outcomes at Family Dispute Resolution are more likely to be workable and fairer.

Access to Appropriate Services

VALS argues that not only should people have access to legal representation prior to Family Dispute Resolution, they should be able to access appropriate Family Dispute Resolution services. For Indigenous Australians appropriate Family Dispute Resolution services means services that are culturally sensitive and aware of the specific needs of Indigenous Australians. Just as Family Dispute Resolution outcomes are more likely to be workable and fairer if there is legal representation available earlier, the Family Dispute Resolution outcomes are more likely to be more meaningful, relevant or workable for Indigenous Australians if the counselor provides a culturally sensitive service to Indigenous Australians.

VALS argues that there should be Koori counselors or mediators available to the Indigenous Australian community if people are to be directed to compulsory Family Dispute Resolution before they can go to Court. There are currently no Koori mediators qualified to handle family disputes. There should be funding for Koorie mediators and funding for Koorie organisations to help Indigenous Australians use the new system as a result of amendments to the Act. What exactly the Relationship Centres will look like is unclear at this stage. A query to the Commonwealth Attorney General's office by VALS about the possibility of more Koorie counsellors/mediators revealed that they are willing to talk to VALS about this possibility. There was even mention about the possibility of Koori Outreach Workers, but we are not sure of their role at this stage.

VALS raise the above issues because it is important to make sure that the tender process for the Family Relationship Centres does not preclude the Family Relationship Centres addressing the needs of Indigenous Australians. It is important that Indigenous Australian organisations receive some of the funds to provide some of the new services (ie: dollars allocated for Family Relationship Centres). It is important to ensure that the structure and content of the tendering process will maximise the capacity of Indigenous Australian organisations to participate in the tender process.

VALS argues that the Request for Tender for the provision of Family Dispute Resolution services should require at the least that tenderers prove a working relationship with an Indigenous Australian organisation. The tender process should be open to Indigenous Australian organisations tendering or even forming a consortium. Please see VALS comments above in the background section about support of mainstream services to become more culturally aware not being at the expense of support for and funding being directed towards a strong and high quality range of Indigenous Australian services.

The tender process should reflect an awareness that Indigenous Australian organisations may be at a disadvantage in competing in a tender process with mainstream organisations that engage in tender process on a routine basis. This raises the issue of the capacity of Indigenous Australian organisations, which do not have the same expertise in tendering processes as mainstream organisations, to compete in a tender process and whether there is a level playing field.

The tender process should require at the least any mainstream tenderer to prove cultural sensitivity, which may require providers to employ Indigenous Australians and provide cultural awareness training to non-Indigenous Australian employees. In the experience of VALS it is often the case that where a mainstream provider that is successful in the tender process is required to be culturally inclusive the realities of funding and logistics often mean that the priority given to cultural sensitivity is minimal.

It is the experience of VALS that there is a place for Indigenous Australian organisations and mainstream organisations to serve the needs of the Indigenous Australian community. It is important for Indigenous Australians to have a choice between the two. It is the experience of VALS that Indigenous Australians prefer to access services provided by Indigenous Australians. For instance, roughly 90% of the Indigenous Australian community come to VALS for criminal law assistance. The remainder go to mainstream services for

various reasons, which shows there is need for a choice of service deliverer. One reason Indigenous Australians choose mainstream services is that they know someone who works at the legal service and they want their problem to remain a secret or conflict of interest.

VALS is also aware that many mainstream services do not have culturally appropriate services and are not accessible to the Indigenous Australian community. It is a myth to assume that services are equally accessible by all Australians. It is the reality that there are many barriers for disadvantaged people, such as Indigenous Australians, in accessing mainstream services and these barriers start at the reception area of mainstream service providers. VALS has completed recent research into the cultural appropriateness of mainstream services. Through a phone survey it was discovered that the majority of mainstream services do not have a policy in place or deliver Koori specific services, Koori friendly services or take a restorative justice approach.

For Family Dispute Resolution to meet the needs of Indigenous Australians it needs to be culturally sensitive, accessible, meaningful and relevant. It is advisable to learn from other examples of how to do the previously mentioned things. A good example is the Koori Court as the success of the Koori Court in comparison to mainstream Courts is partly a result of the involvement of Elders and Respected People making the Court process more meaningful to the offender. The new Family Violence Court is a less satisfactory example of the previously mentioned things. VALS is concerned that because the Men's Mandated Behavioural Change Program (Program) is provided by mainstream organisations the Program will not be culturally sensitive or meaningful. This will result in Indigenous Australians not completing the Court Order to undergo the Program and breaching the Court Order. It is important to learn from these examples and provide culturally sensitive services.

Changes to the Language and Content of the Family Law Act 1975

Recognition of Aboriginal Child rearing practices

VALS supports the inclusion of many of the recommendations of the Family Law Council Report on Recognition of traditional Aboriginal and Torres Strait Islander child rearing practices in the Family Law Act 1975 (Act).¹

VALS notes that the Bill makes some changes to the wording of the Act. For example, instead of referring to the 'need of every Aboriginal and Torres Strait Islander child to maintain a connection with the lifestyle, culture and traditions of his or her peoples' the term 'right to enjoy his or her Aboriginal or Torres Strait Islander culture' has been substituted. We are still seeking advice as to whether this is equivalent to the original recommendation. We are also seeking advice about the matter which the Standing Committee on Legal and Constitutional Affairs (Committee) raised in relation to definition of Aboriginality and will let the Committee know as soon as information comes to hand.

¹ 'Recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices Response to Recommendation 22: Pathways Report, *Out of the Maze*' December 2004

Emphasis on Shared Responsibility and Inclusion of the Word ‘Joint’ in Connection with Shared Responsibility.

Both in the name of the Amendment and in numerous places throughout the Bill the term ‘shared responsibility’ is emphasised. In a number of places in the Bill the word ‘joint’ has been added to sentences containing the words ‘shared responsibility’. As the Act already talks about shared responsibility it is not clear that this represents any effective change to the law.

VALS is not convinced that the emphasis on shared responsibility and inclusion of the word ‘joint’ in connection with shared responsibility will change Court outcomes or the requirement for the Court to consider a range of issues prior to making a decision. VALS questions whether in the light of the recent Joint Custody proposals (ie:50/50) it will create confusion. VALS has spoken to people who work in this field who believe that it is likely to create a false expectation that Joint Residence, or residence to the father, will be more likely under these amendments.

In section 61DA *Presumption of joint parental responsibility when making parenting orders*, immediately after sub section (1) explaining this concept, there is a note in small print stating that this is not a presumption about spending equal time or a substantial amount of time. This cautionary note after 61DA (1) is a recognition of the potential for this emphasis on ‘shared responsibility jointly’ to be misunderstood. The disclaimer does not appear in the Explanatory Statement when this topic is discussed on page 4, nor does it appear after the title of the Bill or after other uses of the term throughout the Bill. It appears only in one paragraph of the 118 page Bill.

Even the Explanatory Statement circulated by the Attorney General could well be misunderstood. On page 6 it says, in the course of describing what advisors are required to tell people at counseling, it states:

If an advisor assisting a person or persons with the making of a parenting plan the advisor is obliged to inform them of the possibility of the child spending substantial time with each of the parties, if it is practicable and in the best interests of the child.

VALS submission in 2003 in relation to a presumption of Joint Residence made the point that the incidence of Joint Residence Orders had steadily declined from 5.1% to 2.5% over the seven years from 1994-95 to 2000-2001. VALS also pointed out that residence in favour of the mother had declined and that residence in favour of the father had increased over that same time frame. ‘Split residence’ and ‘Other’ had also increased. This highlights changing social patterns and the Court responding to these. VALS also highlighted the substantive economic and practical problems that Joint Residence presents for most parents. The Explanatory Memorandum both omits the message that shared responsibility does not mean equally shared time and then emphasises the possibility of joint residence, which is statistically the most unlikely outcome. VALS questions why emphasise this outcome given that it is highly unlikely to occur?

The redrafting of the Act will do little to help the community understand what the Act tries to do and what sorts of matters it considers in making determinations or approving orders. It may well contribute to the myths and confusion.

How to Achieve Shared Responsibility

VALS argues the challenge about improving outcomes for children when parents are separating is in articulating and negotiating an acceptable and appropriate way of sharing the responsibilities given the child's needs and the parent's capacity to meet those needs.

The amendments will not be a panacea for concerned fathers groups or groups who are concerned about protecting children from family violence.

Dissolution of marriage is often associated with the deterioration of trust and communication between parents. Even where this is not accompanied by family violence there can be problems of legal and illegal drug dependence, physical and mental health problems and other events which make the likely hood of agreeing to a parenting plan a tall order.

To the extent that Family Relationship Centres can contribute to the more effective exercise of parental responsibility we support the spending of dollars in this area. However VALS has a number of suggestions which might contribute to a more effective process.

Compulsory Counselling

VALS questions whether compulsory counseling is the optimal way to promote understanding and cooperation from people.

In relation to Indigenous Australian people using counseling or mediation services one of the issues is that counseling is not something which has a strong history in Indigenous Australian culture and there are very few Indigenous Australian family counselors and no Koorie mediators that deal with family disputes. Prior to using compulsion of Family Dispute Resolution the provision of culturally appropriate services would be a valuable first step. Surely there is some value in trying to use education to promote the benefits for the child of parents attempting to reach agreement on major issues.

Advisors Duty

The very lengthy and prescriptive directions as to what an advisor has to tell a client appears to be an obstacle to the advisor being objective or establishing an effective relationship with the client. Surely the first step is to ensure that the client understands the options available to them rather than being delivered a very extensive spiel about the wonders of parenting plans and the (remote) possibility of substantially shared time as a result of a legislative requirement.

Family Dispute Resolution not Attended because of Child Abuse or Family Violence

In VALS presentation at the Public Hearing VALS argued that it is inflexible to require people to go to a dispute resolution counsellor to obtain a certificate which would indicate

that the person had experienced family violence. This potentially puts the dispute counsellor in the position of making a judgement about whether family violence has occurred. It also has the capacity to introduce a new individual/service to the situation when there may well be one or more other services/individuals who can confirm that family violence has occurred.

After VALS presentation at the Public Hearing it was pointed out to us by a member of the Committee that there was provision for people to use information from sources other than a family dispute counsellor to indicate to the Court that family violence was an issue.

We recognise that section 60J (2) may eliminate the need to attend a family counsellor but it is unclear to us which other people or services could provide a certificate or whether the person seeking the Order can make a Statutory Declaration and complete the certificate themselves.

Section 60J (1) requires applicants to attend a dispute counsellor to obtain a certificate prior to being able to obtain a Part Seven Order. VALS questions what the purpose of 60J(1) is when the next paragraph 60J (2) indicates that this does not apply if the Court believes there are reasonable grounds to believe that there is a risk of family violence?

The system proposed by the Bill has a default assumption that all applicants, where family violence has been an issue, should obtain certification from a family counsellor. It is not clear who else can provide certification.

It is widely recognised that surveys of the incidence of family violence will be an undercount due to victims not reporting family violence. The undercount is a result of victims blaming themselves or being fearful and unsupportive community attitudes. The 1996 Australian Bureau of Statistics 'Women's Safety Survey' indicated that 38% of women had experienced family violence since the age of fifteen and that 7.1% of women had experienced family violence in the last twelve months. It is highly likely that due to the under-reporting of family violence and circumstances of people approaching the Family Court the percentages of Family Court users experiencing family violence would be considerably higher than this in reality.

Of those people who had experienced family violence in the last twelve months only 19% had reported it to the police, only 12% had spoken to a counsellor, 18% had told no one. 58% of people had told a neighbour or friend and 53% had told a family member. (Australian Bureau of Statistics 1996).

The above figures suggest that either counselling is generally not available, not known about, or not sought in the majority of cases. If the Court process was going to be more accessible to people who had experienced family violence then a process that relied on self reporting would be the most inclusive process. A process that enabled a friend or family to support the fact or provide certification that family violence had occurred would cater for about half of the potential applicants presenting before the Court with a history of family violence.

It appears likely that an applicant who has suffered family violence could be referred to a Family Relationship Centre, discover there for the first time at counselling that family violence could be a basis for not having to pursue counselling and continue to not say anything about it to the counsellor. This scenario is unacceptable.

The easiest way for the Family Court to indicate that family violence will be taken seriously is if the applicant who has experienced family violence is allowed to fill the certification form out themselves if they want to.

It is not clear to VALS that requiring an applicant who has experienced family violence to attend a relationship counseling service to get a form exempting them from attending counseling is the most flexible or accessible approach.

We believe that this exemption should at least initially be able to be completed by the applicant. If later the Court decided that the evidence of family violence is unclear or unsubstantiated the Court always has the power to revisit the issue of counseling.

Appendix A

Recommendations:

1. Legal advice should be accessible to all prior to undergoing compulsory Family Dispute Resolution.
2. Funding should be provided to Indigenous Australian organisations to enable them to assist Indigenous Australians to receive benefit from the new funding and reforms, and in particular training of Indigenous mediators to handle family disputes.
3. The Committee should at the first opportunity raise the issue of whether the structure and content of the tendering process for these services will maximize the capacity of Indigenous Australian organisations to participate in the tender process.
4. At the very least, mainstream tenderers should be required to prove a relationship with an Indigenous Australian organisation and develop and implement mechanisms to ensure the cultural sensitivity of the organisation.
5. Support of mainstream services to become more culturally aware should not be at the expense of support for and funding being directed towards a strong and high quality range of Indigenous Australian services.
6. Recommendations of the Family Law Council Report on Recognition of traditional Aboriginal and Torres Strait Islander child rearing practices should be included in the Family Law Act 1975.
7. Further advice should be sought by the Committee as to whether the following changes to the wording of the Act are equivalent to the original recommendation. Instead of referring to the 'need of every Aboriginal and Torres Strait Islander child to maintain a connection with the lifestyle, culture and traditions of his or her peoples' the term 'right to enjoy his or her Aboriginal or Torres Strait Islander culture' has been substituted.
8. The possible situation where the emphasis on shared responsibility and inclusion of the word 'joint' in connection with shared responsibility (in the Bill and Attorney General Explanatory Statement) will create a false expectation of Joint Residence, or residence to the father, should be rectified.
9. In re-drafting the Act it is essential to help the community understand what the Act tries to do and what sorts of matters it considers in making determinations or approving Orders. It should not contribute to the myths and confusion.
10. The challenge about improving outcomes for children when parents are separating is in articulating and negotiating an acceptable and appropriate way of sharing the responsibilities given the child's needs and the parent's capacity to meet those needs.
11. To the extent that Family Relationship Centres can contribute to the more effective exercise of parental responsibility VALS supports the spending of dollars in this area. However VALS has a number of suggestions which might contribute to a more effective process.
12. There is need for more Indigenous Australian family counselors and Koorie mediators that deal with family disputes.
13. Prior to using compulsory Family Dispute Resolution the provision of culturally appropriate services would be a valuable first step. Surely there is some value in

- trying to use education to promote the benefits for the child of parents attempting to reach agreement on major issues.
14. The first step is to ensure that the client understands the options available to them rather than being delivered a very extensive spiel by the advisor about the wonders of parenting plans and the (remote) possibility of substantially shared time as a result of a legislative requirement.
 15. A flexible, inclusive and accessible approach is required in obtaining a certificate which would indicate that the person had experienced family violence.
 16. The Bill should be clear about the use information from sources other than a family dispute counsellor to indicate to the Court that family violence has occurred. Clarification is required over which other people or services could provide a certificate or whether the person seeking the Order can make a Statutory Declaration and complete the certificate themselves.
 17. Figures indicate that either counselling is generally not available, not known about, or not sought in the majority of cases should be taken into account. If the Court process is to be more accessible to people who have experienced family violence then a process that relied on self reporting would be the most inclusive process. A process that enabled a friend or family to support the fact or provide certification that family violence had occurred would cater for about half of the potential applicants presenting before the Court with a history of family violence.
 18. The following scenario is to be avoided: an applicant who has suffered family violence could be referred to a Family Relationship Centre, discover there for the first time at counselling that family violence could be a basis for not having to pursue counselling and continue to not say anything about it to the counsellor.
 19. The easiest way for the Family Court to indicate that family violence will be taken seriously is if the applicant who has experienced family violence is allowed to fill the certification form out themselves if they want to.
 20. The certificate should at least initially be able to be completed by the applicant. If later the Court decided that the evidence of family violence is unclear or unsubstantiated the Court always has the power to revisit the issue of Family Dispute Resolution.